

**HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

(1) CRR No.54 of 2015 (O&M)

Date of Decision: 18.11.2015

Varinder Singh Sandhu

. . . . Petitioner

VS.

State of Punjab

. . . . Respondent

(2) CRM-M-6530-2015 (O&M)

Narinder Kumar Goyal

. . . . Petitioner

VS.

State of Punjab

. . . . Respondent

CORAM: HON'BLE MR.JUSTICE SURYA KANT

HON'BLE MR.JUSTICE P.B. BAJANTHRI

Present: Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. Vishal Deep Goyal, Advocate and
Mr. DS Pheruman, Advocate for the petitioner(s)

Ms. Reeta Kohli, Addl. AG Punjab

Mr. Vaibhav Sharma, DAG Punjab

SURYA KANT, J.

(1) This order shall dispose of Criminal Revision No.54 of 2015 & CRM-M No.6530 of 2015 as the point in issue raised in both the cases is whether the petitioners are entitled to statutory bail under Section 167(2) of the Code of Criminal Procedure read with Section 36-A(4) of the Narcotic Drugs and Psychotropic Substances Act, 1985?

(2) Before we dwell upon the legal issue, a brief reference to the relevant facts of both the cases may be made.

CRR-54-2015 (Varinder Singh Sandhu vs. State of Punjab)

(3) The petitioner is a co-proprietor in M/s Mefro Organic Ltd. – a pharmaceutical industry, set up in the Industrial Area at Tahliwala, District Una (HP). He is stated to be a Non-Resident Indian.

(4) The petitioner is one of the accused in the case FIR No.92 dated 03.06.2014 registered under Section 21/22/25/25-A/27/27-A/29/61/85 of the NDPS Act read with Sections 25/54/59 of the Arms Act at Police Station, Pasiana, District Patiala. The petitioner is alleged to have been manufacturing and smuggling narcotic drugs as well as making illegal supply of the 'controlled substances' like pseudoephedrine within and outside India. It is further alleged that 6kg 780gm pseudoephedrine and 2kg diphenoxylage powder was recovered from his possession.

(5) The petitioner was arrested on 04.06.2014. The period of 180 days of his maximum detention during the pendency of investigation expired on 01.12.2014. On that very day, Additional Public Prosecutor moved an application under *proviso* to Section 36-A(4) of the NDPS Act in which the Special Court issued notice to the petitioner for 02.12.2014. The petitioner then applied for the grant of statutory bail on 02.12.2014. The Special Judge vide a common order dated 05.12.2014 allowed the prosecution's application and granted extension to complete the ongoing investigation whereas the petitioner's bail application was dismissed. The said order is under challenge in the instant revision petition.

CRM-M-6530-2015 (Narinder Kumar Goyal vs. State of Punjab)

(6) This is the petitioner's second petition under Section 439 read with Section 167(2) of the Code of Criminal Procedure, seeking regular bail in the case FIR No.92 dated 03.06.2014 registered under Section 21/22/25/25-A/27/27-A/29/61/85 of the NDPS Act read with Sections 25/54/59 of the Arms Act at Police Station, Pasiona, District Patiala.

(7) The petitioner had earlier filed CRR-46-2015 which was permitted to be withdrawn on 19.02.2015 to enable him to file a fresh petition for regular bail under Section 439 read with Section 167(2) CrPC. Hence the instant petition.

(8) The petitioner was arrested on 17.06.2014. The maximum period of 180 days of permissible detention during investigation expired on 14.12.2014, however, the challan was presented on 24.12.2014 without seeking extension of time to complete the investigation. The petitioner thus meanwhile acquired an indefeasible right of bail under Section 167(2) CrPC read with Section 36-A(4) of the NDPS Act. He applied for the same before the Special Court, Patiala but it appears that his counsel withdrew that application on 17.12.2014.

(9) The prosecution case is that on an application moved under Section 36-A well in advance, the Special Court vide order dated 05.12.2014 had granted 30 days' additional time to complete

the investigation. The challan was presented within that extended period.

(10) Faced with this, the petitioner has pressed for the grant of bail under Section 439 CrPC on merits also. It was urged by his learned counsel that though the petitioner was involved in the past in several NDPS cases but all such cases being totally false, he has been acquitted as per the following details:-

Sr.No.	Particulars of case		Date of order/decision
	Case No.	FIR	
1.	Sessions Case No.128/NRT of 31.05.2013/05.09.2013	FIR No.69 dated 08.03.2013 U/S 21/22/61/85 NDPS Act, PS Mandi Gobindgarh	05.10.2013
2.	Sessions Case No.NDPS-29044 of 2013/ 07.05.2010	FIR No.02 dated 01.01.2010 U/S 21/22/23/29/61/85 NDPS, PS SSOC/PB, Amritsar	24.09.2014
3.	NDPS Case No.87 of 27.10.2010	NCB Crime No.07 of 10.06.2009 U/S 8&22 of NDPS Act	05.01.2015
4.	Sessions Case No.3 of 23.5.2014	FIR No.45 dated 27.03.2014 U/S 120-B IPC and Section 7,8,13(1)(d) read with Section 13(2) of PC Act, 1988, PS Mataur	07.08.2015

(11) On the other hand, learned State counsel contended that the petitioner is a close associate of Jagdish Singh @ Bhola who is the kingpin of drug mafia. He is also a co-accused with Jagdish Singh @ Bhola in a case of recovery of 25kg Methamphetamine (ICE)

registered by NCB, Mumbai. The petitioner is stated to be the expert in making ICE and he was allegedly doing so in the factory premises of Jagdish Singh @ Bhola.

(12) We have heard learned counsel for the parties at a considerable length and gone through the record.

(13) It requires no elaborate discussion that having regard to the legislative object behind enactment of Section 167(2) CrPC is to ensure that an accused person must not be in any circumstances, detained beyond ninety days pending investigation of an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.

(14) As regard to a person accused of an offence punishable under Sections 19, 24 or 27-A or for offences involving 'commercial quantity', in view of Section 36-A(4) of the NDPS Act, the maximum detention period pending investigation can be extended to 180 days.

(15) The Special Court may further extend the period of retention upto one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for detention of the accused beyond one hundred and eighty days. Sub-Section (4) of Section 36-A of the NDPS Act in this regard reads as follows:-

“(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27 A or for offences involving commercial quantity

the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."

(16) Sh. Pheruman, learned counsel for the petitioner (Varinder Sandhu) vehemently contended that since maximum period of one hundred and eighty days of lawful detention expired on 01.12.2014, the petitioner acquired an indefeasible and legally enforceable right for bail which could not be denied by the Special Court by accepting the application moved by an incompetent authority for extension of the investigation period. He precisely contended that:-

- (i) the petitioner (Varinder Sandhu) was entitled to be released on bail as a matter of right on 01.12.2014 on expiry of 180 days of detention period;

- (ii) no application to extend the period of investigation was maintainable at the instance of Additional Public Prosecutor as only the 'Public Prosecutor' could apply for it;
 - (iii) there were no valid reasons to grant extension for completion of investigation;
 - (iv) the only plea taken was the non-availability of Chemical Examiner's report for which the petitioner cannot be penalised;
 - (v) the factors like gravity of offence, conduct of accused or other considerations though may be relevant while granting or refusing bail on merits but are alien to the scheme of Section 167(2) CrPC;
 - (vi) since the petitioner availed of his right to grant statutory bail and applied on 02.12.2014, it was imperative upon the Special Court to release him on bail;
 - (vii) the application for grant of extension was moved by prosecution with *mala fide* intention. In fact, the application was at the behest of SHO-cum-IO and not by the Public Prosecutor who is expected to apply his mind independently being an officer of the Court.
- (17) Learned counsel for the petitioner (Varinder Sandhu) cited a catena of decisions interpreting the meaning and scope of Section 167(2) as well as provisions like Section 20(4) of the TADA

Act, 1987 which is *pari materia* to sub-Section (4) of Section 36-A of the NDPS Act. His compilation includes: (i) **CBI, Special Investigation Cell-1, New Delhi vs. Anupam J. Kulkarni, (1992) 3 SCC 141;** (ii) **Hitendra Vishnu Thakur v. State of Maharashtra, (1994) 4 SCC 602;** (iii) **Sanjay Dutt v. State through CBI Bombay, (1994) 5 SCC 410;** (iv) **Uday Mohanlal Acharya vs. State of Maharashtra, (2001) 5 SCC 453;** (v) **Sanjay Kumar Kedia @ Sanjay Kedia vs. Intelligence Officer, Narcotic Control Bureau & Anr., (2009) 17 SCC 631;** (vi) **Sayed Mohd. Ahmed Kazmi vs. State, GNCTD & Ors., (2012) 12 SCC 1;** (vii) **Union of India through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, (2014) 9 SCC 457;** (viii) **Banti vs. State of Punjab (CWP No.2342 of 2014)** decided on 04.09.2014; (ix) **Gurwinder Singh vs. State of Punjab (CRM-M-20586-2014)** decided on 24.06.2014; (x) **Rashpal Singh vs. State of Punjab (CRM-M-11650-2014)** decided on 07.04.2014; (xi) **Sukha @ Sukhdev Singh vs. State of Punjab, CRR-3837-2014)** decided on 18.12.2014; (xii) **Nardev Inder Singh vs. State of Punjab (CRM-M-3339-2014)** decided on 04.02.2014.

(18) Learned State counsel, contrarily urged that the Public Prosecutor invoked the remedy available under *proviso* to sub-Section (4) to Section 36-A before expiry of 180 days and the reasons assigned for seeking extension to complete investigation being

worthy of acceptance, the learned Special Court rightly accepted the Public Prosecutor's application after an advance notice to the petitioner.

(19) Before advertng to the factual scenario of the case in hand, it may be briefly noticed that in **Hintendra Vishnu Thakur's** case (supra), the Hon'ble Supreme Court considered the scope of Section 20(4) of TADA Act read with Section 167(2) CrPC and held that once the period for filing the charge-sheet has expired and either no extension has been granted or the period of extension has also expired, the accused person would be entitled to be admitted to bail and the Court has no authority to deny the same if the accused is ready to furnish the requisite bail bonds. It was further held that even in the absence of an express provision, the application, if any, moved by the prosecution for extension of time to complete the investigation or by the accused to release him on statutory bail should be decided after notice to avoid the possibility of deliberate or inadvertent concealment of facts. It was also held that no condition like the gravity of the case, seriousness of the offence or character of the offender etc. can weigh with the Court at that stage to refuse bail to an accused under Section 167(2) CrPC.

(20) The Constitution Bench in **Sanjay Dutt's** case, approved **Hintendra Vishnu Thakur** subject to the following clarification and condition contained in paras 48 and 49 which read as follows:-

“48. We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(bb) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for

release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(bb), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See Naranjan Singh Nathawan v. State of Punjab[9]; Ram Narayan Singh v. State of Delhi and A.K. Gopalan v. Government of India[11].)

49. This is the nature and extent of the right of the accused to be released on bail under Section 20(4)(bb) of the TADA Act read with Section 167 CrPC in such a situation. We clarify the decision of the Division Bench in Hitendra Vishnu Thakur, accordingly, and if it gives a different indication because of the final order made therein, we regret our inability to subscribe to that view.”

(21) In **Uday Mohanlal Acharya’s** case (supra), the expression “*if not already availed of*” used in **Sanjay Dutt’s** case (supra) was explained and construed as follows:-

“13. With the aforesaid interpretation of the expression 'availed of' if charge-sheet is filed subsequent to the availing of the indefeasible right by the accused then that right would not stand frustrated or extinguished, necessarily therefore, if an accused entitled to be released on bail by application of the proviso to sub-section (2) of Section 167, makes the application before the Magistrate, but the Magistrate erroneously refuses the same and rejects the application and then accused moves the higher forum and while the matter remains pending before the higher forum for consideration a charge-sheet is filed, the so-

called indefeasible right of the accused would not stand extinguished thereby, and on the other hand, the accused has to be released on bail. Such an accused, who thus is entitled to be released on bail in enforcement of his indefeasible right will, however, have to be produced before the Magistrate on a charge-sheet being filed in accordance with Section 209 and the Magistrate must deal with him in the matter of remand to custody subject to the provisions of the Code relating to bail and subject to the provisions of cancellation of bail, already granted in accordance with law laid down by this Court in the case of Mohd. Iqbal v. State of Maharashtra (supra).”

(emphasis applied)

(22) It may thus be seen that in view of *dictum* in **Uday Mohanlal Acharya’s** case (supra), if the charge-sheet is filed after the accused has availed his right to seek bail under Section 167(2) CrPC, then his right cannot be frustrated or extinguished on the premise that meanwhile challan has been presented.

(23) These principles have been reiterated by the Supreme Court in (i) **Union of India vs. Hassan Ali Khan and Ors. (2011) 10 SCC 235**, and (ii) **Sayed Mohd. Ahmed Kazim’s** case (supra) as

well except that **Pragyna Singh Thakur vs. State of Maharashtra (2011) 10 SCC 445**, records a note of discordant.

(24) The later decision in **Union of India through CBI vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, (2014) 9 SCC 457** is indeed an encyclopaedia on the entire case law as it very eloquently delineates the *ratio decidendi* of all the cited decisions, before ruling that the decisions rendered by Constitution or larger Benches in **Sanjay Dutt** and **Uday Mohanlal Acharya** cases are the binding precedents.

(25) It thus emerges from the cited case laws that (i) Section 167(2) CrPC read with Section 36-A(4) of the NDPS Act confers an indefeasible right in favour of an accused person to seek bail on expiry of 180 days if the investigation is still pending; (ii) such a right cannot be defeated by submitting the charge-sheet after 180 days and during the period when the bail application is under consideration; and (iii) the application by prosecution to extend the period of investigation cannot be allowed mechanically and there must exist valid and sufficient reasons for such extension.

Varinder Singh Sandhu's case

(26) Applying these principles to the facts and circumstances of the case(s) in hand, it may be seen that in **Varinder Sandhu's case**, the period of 180 days was to expire on 01.12.2014 and on that very day, the Additional Public Prosecutor applied for extension of time to complete the investigation. The Additional Public Prosecutor

averred in his application that 'pseudoephedrine' and 'narcotic powder' along with sample seal were duly deposited in the office of Forensic Science Laboratory at Mohali but its report was still awaited despite two reminders dated 24.10.2014 and 24.11.2014 sent by SHO Police Station, Kotwali Nabha.

(27) The notice of the aforesaid application was admittedly given to the petitioner (Varinder Sandhu) for 02.12.2014. On that very day, he also applied under Section 167(2) CrPC for the grant of bail. The Special Court allowed the application of Additional Public Prosecutor but rejected that of the petitioner, observing that having regard to the nature of allegations regarding petitioner's connivance with the persons settled abroad, more time should be given to the prosecution to complete the investigation.

(28) As is revealed by the undisputed facts, the petitioner cannot seek advantage of the expiry of 180 days, for on the date of such expiry itself, the Additional Public Prosecutor applied for extension of time. The notice of that application was also duly given to the petitioner. The principles laid down in **Hitendra Vishnu Thakur** and **Sanjay Dutt** cases have thus been complied with. It is not a case where the Additional Public Prosecutor applied for extension of time after the expiry of 180 days or as a counter-blast to the petitioner's application under Section 167(2) CrPC.

(29) So far as the petitioner's plea that only the Public Prosecutor could apply for extension of time to complete the

investigation and not the Additional Public Prosecutor is concerned, it is undeniable that the expression “Public Prosecutor” has not been defined under the NDPS Act. Its Section 2(xxix), however, says that *“words and expressions used herein and not defined but defined in the Code of Criminal Procedure, 1973 (2 of 1974) have the meanings respectively assigned to them in that Code”*.

(30) Section 2(u) of Code of Criminal Procedure defines “Public Prosecutor” to mean *“any person appointed under Section 24, and includes any person acting under the directions of a Public Prosecutor”*. Section 24(3) of the Code says that for every District, the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the District and such Public Prosecutor or Additional Public Prosecutor for one District can be appointed for another District as well. From the combined reading of both the provisions of the Code, it stands established beyond any doubt that the expression “Public Prosecutor” includes “Additional Public Prosecutor” also. The application moved by the Additional Public Prosecutor in the instant case was thus very much maintainable.

(31) As regard to the question whether there existed valid grounds for the Special Court to extend the period for completion of the investigation, each case has to be considered keeping in view the nature of allegations and other attending circumstances. The petitioner in the first case (Varinder Sandhu) is the co-proprietor of a

pharmaceutical industry. The allegations against him are of manufacturing and marketing illicit narcotic drugs as well as of illegal sale of the 'controlled substance' supplied to him under a valid licence. The further allegation is that a huge quantity of pseudoephedrine (a controlled substance) and methamphetamine (ICE) – an illicit narcotic product were recovered from him. The prosecution is thus under a heavy legal obligation to *prima facie* substantiate its allegations that what was allegedly recovered from the petitioner was either a controlled substance or an illegally manufactured narcotic drug. In the absence of such material, even the report under Section 173 CrPC could not stand for a moment. The FSL report was thus the solitary backbone for the survival of the charge-sheet and in the absence thereof, the petitioner could not be even remotely connected with the offence. This would undoubtedly justify the withholding of Section 173 report by the IO so as to await the FSL report.

(32) The petitioner appears to be true while alleging that the investigating agency did not show the desired promptness in securing the FSL report of the samples sent on 16th and 23rd June, 2014 through special messenger. But then it cannot be overlooked that the Forensic Science Laboratory is not under the administrative control of Police Department and the delay in all probabilities occurred due to long queue of pending samples. The investigating agency therefore cannot be blamed entirely. Unfortunately, the

learned Special Court has passed a totally casual order without elaborating the reasons which prompted it to grant extension to the prosecution to complete the investigation.

(33) Be that as it may, in view of the fact that (i) the Additional Public Prosecutor was competent to apply for extension of time; (ii) such an application was moved before expiry of one hundred and eighty days' period; (iii) the extension was sought before the petitioner applied for his bail under Section 167(2) CrPC and (iv) the fact that no charge-sheet could be filed for want of FSL report as it would have led to rejection of the charge-sheet itself, we are of the considered view that the petitioner (Varinder Sandhu) is not entitled to the benefit of Section 167(2) CrPC. His revision petition is accordingly dismissed. This order shall, however, cause no prejudice to the petitioner's prayer for bail on merits, if he applies for the same.

Narinder Kumar Goyal's case

(34) Adverting to the second case (Narinder Kumar Goyal), we find that the petitioner's claim for the grant of bail under Section 167(2) CrPC is totally misconceived and misdirected. He was arrested on 17.06.2014. The period of 180 days expired on 14.12.2014. He applied under Section 167(2) CrPC for bail under the wrong impression that the charge-sheet was filed on 24.12.2014 i.e. much after expiry of one hundred and eighty days' period. He then withdrew the application under Section 167(2) CrPC as noticed by

learned Special Judge, Patiala in his order dated 24.12.2014, obviously on realizing the fact that the said Court had vide an earlier order dated 05.12.2014 granted 30 days' additional time to further investigate the matter and the challan was presented on 24.12.2014 well within that extended period.

(35) So far as the petitioner's (Narinder Kumar Goyal) claim to release him on regular bail under Section 439 CrPC is concerned, it is true that he has been acquitted in some of the cases registered under the NDPS Act. However, having regard to the facts that (i) the petitioner has been found involved repeatedly in NDPS cases; (ii) he is currently facing trial along with Jagdish Singh @ Bhola in yet another case under NDPS Act registered by NCB Mumbai; (iii) he is alleged to be a close associate of the kingpin of drug mafia, coupled with the allegations attributed to him in the instant case, we are satisfied that none of the ingredients of Section 37(1)(b)(ii) of the NDPS Act can be said to have been satisfied. It is not expedient or desirable at all to release the petitioner on bail at this stage. Consequently, and without expressing any opinion on the merits, his bail application is dismissed on both counts.

(Surya Kant)
Judge

18.11.2015
vishal shonkar

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(P.B. Bajanthri)
Judge